No. 293

IN THE

Supreme Court of the United States

October Term, 1949

293

UNITED STATES OF AMERICA,
Petitioner,

v.

ALBERT J. RABINOWITZ,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

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Opinions Below

The majority opinion (Judge LEARNED HAND, Judge FRANK, concurring) and the dissenting opinion of Judge CLARK, in the Court of Appeals, (R. 225-30) are reported in 176 F. 2nd 732. There are no reported opinions in the District Court. The statements of the trial judge (Judge RIFKIND) appear in the record. Judge MCDUFFIE, who denied the motion to suppress, in advance of trial, wrote no opinion.

Jurisdiction

The case is before this Court on certiorari granted November 21, 1949.

The respondent filed a cross-petition for certiorari to review so much of the judgment of the Court of Appeals as refused to dismiss the first count on grounds other than

the admission of evidence unlawfully seized (Points II and III of this brief). This Court denied the cross-petition on the ground that it was untimely filed.

In a memorandum, filed in opposition to the cross-petition, the government requested the Court to limit the writ, if granted, to the single issue presented by the government's petition. This Court did not so limit the writ.

Questions Presented in Addition to the Question Stated in the Government's Brief

Was this defendant guilty of a crime against the United States under Section 147 of the Criminal Code, as amended, 18 U. S. C. 261, since the charge is that the defendant sold and kept in possession, altered canceled United States postage stamps, with intent to defraud philatelists and there is no charge that the canceled stamps had been so altered as to make possible their use as postage?

Was there a fatal variance between the indictment and the crime charged?

Both of these questions were presented in the District Court (R. 183, 189) and urged in the Court of Appeals (see majority opinion). Since this Court declined to limit the writ, it is respectfully submitted, that they are here.

Langnes v. *Green*, 282 U. S. 531;
United States v. *Ballard*, 322 U. S. 78.

Statement

To the statement in the government's brief, the following is added:

The charge against the defendant was not that he sold (under the first count) or possessed for the purpose of

sale (under the second count) altered postage stamps, but that he sold and possessed, for the purpose of sale, altered canceled postage stamps. It is not charged that the defendant was attempting to make it appear, for any purpose, that the stamps, which he sold or possessed, were uncanceled stamps. The cancellation marks clearly appeared upon the stamps. No one tampered with them. The government's own expert witness so testified and the government so admits (R. 154-6, R. 39).

The charge against the defendant is that he sold and possessed for sale canceled postage stamps, to which overprints such as "Kan" "Nebr" "Canal Zone" were added, giving them the appearance of canceled postage stamps of the same monetary denomination, but of a different issue (R. 44).

In connection with the search and seizure the respondent adds to the government's statement: When Kalish (defendant's confederate) was arrested he delivered to the United States District Attorney the dies that he had used in overprinting the stamps, including the dies used in overprinting the canceled stamps, involved in the first count, which had been sold to the witness Benjamin Skulnik (R. 89, 104).

When Skulnik purchased the four canceled stamps he obtained a receipt for the purchase price ($1.72) which he delivered to his superior (R. 49).

Summary of Respondent's Argument

The search and seizure were unlawful. The search was an exploratory one, not instituted in good faith to find either the instrumentality with which the crime was committed, the fruits of the crime or weapons of escape.

At the time the defendant was arrested the government had in possession the written confession of Kalish, the printer, the very dies used in making the overprints and the receipt for the $1.72 paid by the post office employee for the four canceled stamps, purchased by him. The government had by that time submitted the four canceled stamps to its expert Souren and had his opinion that the overprints were not only spurious but were made by the dies turned over to the district attorney by Kalish (R. 147, 178):

The case differs essentially from *Harris* v. *United States* (331 U. S. 145), in that the search in *Harris* was initiated to find the instrumentality with which the crime was committed.

Secondly, respondent urges that he was not guilty of a crime against the United States, under either count of the indictment. The Government makes no claim that any alteration was made to the canceled stamps, which would facilitate their use as postage. Prior to 1938 the acts charged would admittedly not have been a federal crime. In 1938, by an amendment to section 147 of the Criminal Code, 18 U. S. C. 261, the words "and canceled United States stamps" were added to the definition of "obligation or other security of the United States." This was not done by an isolated Act, but as part of a plan to permit the illustration of United States stamps in publications or catalogues. Respondent urges that the intent of Congress was to protect the integrity of the postage, by punishing any one who sought to take advantage of the liberalized Statute, to use facilities for reproducing copies of canceled stamps in production of simulated uncanceled stamps.

Finally, respondent urges that the indictment fails to allege the crimes actually charged and that the defendant

was denied his Constitutional rights, in being forced to plead and proceed to trial before a court not informed by the indictment of the true elements of the crime charged.

ARGUMENT

I.

The Court of Appeals properly reversed because of the use of evidence seized in an unlawful search.

The government rests upon *Harris* v. *United States*, 331 U. S. 145. It says that the activities of the law enforcement officers here were more limited in scope than those which received judicial approval in that case. By that counsel doubtlessly means that it was more limited in time and space, but as this Court said in a recent case, *Lustig* v. *United States*, 338 U. S. 74, a search is not physical but functional. Surely counsel for the government will not contend that it would weaken their position if the respondent's office had four rooms and the search lasted five hours. Constitutional rights do not vary with the size of a person's house or office or his ability to select hiding places.

In *Harris* the search commenced in lawful purpose. In good faith to find the instrumentalities, by which the crime was committed. Here the search was instituted for no such purpose. When the search was made the Government had in its possession, not only the four canceled stamps purchased by the postal representative but the receipted bill of the defendant for the purchase price, the confession of the printer and the actual dies used in making the overprints. The government's expert Souren who accompanied the arresting officer and the others on the pilgrimage to defendant's office, testified upon the trial that the overprints on the four canceled stamps were made

by the dies turned over to the government by Kalish at the time of his confession (R. 147, 178).

The supposition urged in the government's brief, that because the warrant for defendant's apprehension is not in evidence, it may be assumed that it charged the crime of concealing as well as selling, is refuted by the affidavit on which the warrant was obtained (which is in evidence at page 14 of the record). The affidavit charges the sale and makes specific reference to the four canceled stamps sold.

Exploratory searches for the purpose of obtaining evidence of other crimes, or of the crime for which the defendant is arrested, were illegal before the *Harris* case, *United States* v. *Lefkowitz*, 285 U. S. 452, and were not rendered legal by anything there decided. The prevailing opinion in the *Harris* case makes clear that the search was not one of general exploration, but was specifically directed to the means and instrumentalities by which the crime was committed. This Court was careful to emphasize in the *Harris* opinion that the problem presented was not one in which the officers entered ostensibly to make an arrest, but in reality to conduct an exploratory search.

No one questions the right of law enforcement officers to make those searches, which may be said to be part of the *res gestae* of a lawful arrest. The "frisking" of one arrested, to make certain that he possesses no weapons or the search of his immediate surroundings to locate the fruits of his crime or the means by which the crime was committed can almost be said to be reflex police action. Such activity is vitally different from the deliberately planned search, which employs the warrant of arrest as a substitute for the search warrant. If warrants of arrest may be obtained charging a crime, and unlimited searches made thereunder for anything which may be

found the Constitutional safeguard against warrants of seizure is gone. Indeed one's dearest possessions, his private papers, which cannot even be seized under a warrant, *United States* v. *Lefkowitz*, 285 U. S. 452, will be subject to exploration. Moreover, as in this very case, the officers may take items unrelated to any crime (The postal inspector, testified that thousands of stamps were taken from defendant, R. 80) seriously impairing the ability of a person charged with crime to defend himself. The procurement of a warrant of seizure, where a warrant of arrest has been issued is not a mere "formality," as the dissenting opinion below suggests. A warrant of seizure must "particularly" describe "the things to be seized."

We respectfully submit, that despite the assertion in the dissenting opinion below, the majority opinion did not purport to overrule the *Harris* case or hold in effect that this Court had done so in *Trupiano* v. *United States*, 334 U. S. 699. The basic question in both those cases, as in this, was whether the search was incidental to the arrest or the arrest incidental to the search. In the *Harris* case, this Court held the search an incident of the arrest. In *Trupiano* it was said by the Court that it was a mere fortuitous circumstance, that the defendant was present at the scene of the seized evidence, at the time. So here. The officers of the law deliberately planned to arrest the defendant, at his place of business, at a time when they had in their company the assistant United States district attorney, who could select any evidentiary material for the later prosecution, and the expert witnesses who, it was not to be anticipated, were instructed to confine their inspections to instrumentalities of a particular crime or weapons of escape.

The arresting officers made no pretense that they were in search of the instrumentality of the crime, which they already had, the fruits of the crime, which had been paid

several weeks before, and for which they held a receipt or for weapons of escape. The defendant was, as pointed out in the opinion below, doing business openly from the date of sale of the four stamps, February 6, 1943 to the date of the arrest, February 16, 1943.

Here then was a case for a warrant of seizure which would particularly describe "the things to be seized." The unjust result of allowing officers of the law to prowl at random and seize at will is well illustrated by certain of the facts here. Though the charges against the defendant arise out of the sale of "overprints," there are three stamps depicted in the second count which are not "overprints" (R. following p. 4). These are the two cent "Jackson," the two cent "Washington" and the ten cent "Washington". The Government contention as to those stamps is that a grille (which is a series of dotted indentations) had been added to the face of the "Jackson" stamps, to simulate grilles, at one time placed on some of the "Jacksons" by the Post Office and that the edges of the two "Washington" stamps had been changed (R. 143, 145, 146). There is no evidence that the defendant had any knowledge of those changes in the three stamps, but the stamps were none the less presented to the grand jury and used in the indictment.

In the brief here, the Government argues that the defendant's stock of stamps was, in a real sense, the instrumentality of his crime of selling the four canceled stamps. That crime was complete when the four stamps were sold by the defendant. The defendant's stock, out of which the four were taken, was not connected with that transaction, since even if every other stamp in his place was genuine or not known to defendant to be bad, the act of selling the four altered canceled stamps, with knowledge that they were altered, would not have been any less a crime. True, the evidence that the defendant,

was at a later date, in possession of similarly overprinted canceled stamps might furnish corroboration of intent, though the Government was in possession of sufficient evidence of intent, in the written confessions of Kalisch and the dies. If the search for corroboration were a permissible exception to the rule, it is difficult to imagine any case in which the arresting officers might not institute a search.

Nor can the Government sustain its position by anything said or decided in *Agnello* v. *United States* (269 U. S. 20), to which it refers. In that case the drugs, used as evidence, were displayed or on the person of one of the defendants, as part of the criminal sale, for which the defendants were contemporaneously arrested.

It is difficult to comprehend the dilemma of peace officers by anything decided by the Court of Appeals in our case. Of course all police officials would like free rein in searching and seizing when an arrest is made. But if they know that in every case, where there is time, especially where, as in this case, they have time to consult with Government's attorneys, they must procure search warrants, the question will not arise.

Difficulty may arise in specifying with particularity the objects to be seized. That however is the Constitutional command. It cannot be set at naught by classifying as an incident to an arrest, that which is obviously a deliberate search, indulged in because of the "coincidence" of finding the person to be arrested at the place to be searched.

Petitioner's brief, in effect, requests the Court to overrule *Trupiano* v. *United States*, 334 U. S. 699, for the distinctions the brief makes between the facts of that case and this are specious. The arresting officers in this case, as in *Trupiano*, had an abundance of facts upon which to base their application for a search warrant. If there had been danger, that the stamps would be disposed of, it is

not likely that the officers would have waited ten days after the sale and seven days after receiving the expert's report, to procure the warrant of arrest.

In conclusion Petitioner argues that if the arrest had been made coincident with the sale, a search would have been justified. Assuming that to be so and assuming also that the arrest were not deliberately planned as an excuse for the search, the arresting officers would have then been "in hot pursuit." Such pursuit justifies many acts which deliberation vetoes, the right for example, as stated in *McDonald* v. *United States*, 335 U. S. 451, to demand entrance to a dwelling when a shot and cry is heard, whereas otherwise a man's home is his castle. If the brief, however, means to infer that peace officers may in the future deliberately prime their activities so as to make "spot arrests, in all cases where a search is desired, instead of applying for search warrants, that is a form of lawful lawlessness with which Congress may be relied upon to appropriately deal, when the occasion arises. In the meanwhile this Court should not bow to the threat.

II.

The respondent was not guilty of a crime under Secs. 151 and 154 of the Criminal Code, 18 U. S. C. 265, 268.

Prior to 1938 the acts of which the defendant was convicted would not have been a federal crime. Certainly not under Secs. 151 or 154 of the Criminal Code.

In 1938 by 52 Stat. 6, 75th Congress, 3rd session (printed as an appendix to this brief), section 147 of the Criminal Code (18 U. S. C. 261) defining "obligation or other security of the United States" was amended by adding the words "and canceled United States stamps."

These words were added as part of the comprehensive plan permitting printing of black and white illustrations of United States and foreign postage stamps. The specific purpose of adding canceled United States stamps to the definition of obligations and securities was to permit the seizure, of plates and other matter, from which canceled stamps were printed. The letter from Mr. Wayne C. Taylor, acting Secretary of the Treasury, to Vice President Garner, quoted in *United States* v. *Pappas*, 134 F. 2nd 922, makes this clear:

> "Furthermore, the proposed bill amends existing law to include canceled United States postage stamps within the laws relating to obligations and other securities of the United States, and provides for the forfeiture to the United States of articles, devices, and other things, in respect to which there has occurred violation of certain of the criminal laws of the United States relating to obligations and other securities of the United States and foreign governments, etc."

The object of the government was the protection of the integrity of the postage, as postage. The Treasury was hardly concerned with philately.

Canceled postage, as such imposes no obligation upon the United States. There is potential danger that it may be changed or washed or otherwise used, as in the *Pappas* case (*supra*), to simulate uncanceled postage. In this case there is no claim that any such danger existed. The prices at which the canceled postage stamps were sold exceeded face value.

If read literally the acts of defendant are within the orbit of the language of the revised Criminal Code. He sold and kept in possession altered canceled United States postage stamps. Respondent urges that the sections should not be read literally, but should be read so as to encom-

pass the purpose of punishing those who seek to use plates or other means or reproducing canceled stamps to simulate uncanceled ones.

Sections 151 and 154 of the Criminal Code are the "counterfeiting" sections. The crimes therein embraced are among the most heinous and the punishment the severest found in federal criminal law. Counterfeiting as the term is generally used is one of the most serious offenses, for it undermines the credit of the nation and the confidence of the people in their government. In Blackstone's day, it was, under English law, a form of treason.

Gavitt's Blackstone Chapt. VI, Sub. 7 (2).

If Congress intended to make the alteration of a canceled postage stamp, to defraud a philatelist, the crime of counterfeiting, the will of Congress will be followed. When, however, a literal application of the words of a statute results in an absurd conclusion, courts do examine its purpose, its title and all relevant surrounding events to determine whether somewhere the worship of the written word has not killed the spirit which would give life to the interest.

Holy Trinity Church v. *U. S.*, 143 U. S. 457;
U. S. v. *Katz*, 271 U. S. 354;
U. S. v. *St. Paul Ry. Co.*, 247 U. S. 310.

This examination of legislative purpose to determine intent is particularly appropriate, when Congress enlarges the meaning of one statute by amending another;

Markham v. *Cabell*, 326 U. S. 404.

The Statute of 1938, 52 Stat. 6, reveals no great danger to the nation at large or philatelists in particular which required legislation of such drastic nature. The sense

of the legislation was entirely prospective. The government printing office was to embark upon a new venture and in order to assure the Treasury that there would be no loss of receipts from revenue, by illicit use of plates or other matter, from which postage stamps were printed, a definition was amended, to make possible the seizure of unlawfully used plates or other matter.

This Court has repeatedly held that Sec. 148 of the Criminal Code (a companion section to 151 and 154) applies only to those attempting a fraud upon the United States.

Prussian v. *United States*, 282 U. S. 675.

A comparison of the punishment possible under sections 151 and 154 of the Criminal Code with that provided under Sec. 219 of the Criminal Code, for counterfeiting uncanceled United States postage would seem to establish conclusively that Congress had no thought when it passed 52 Stat. 6 of 1938, to include as a counterfeiter and forger of the obligations and securities of the United States, one who altered a canceled postage stamp, as a canceled postage stamp, in order to defraud a philatelist—particularly in a situation wherein no possibility exists of a fraud upon the government.

Section 151 of the Criminal Code, under which respondent was convicted for selling canceled altered postage stamps, provides a fine not exceeding $5000 and imprisonment for a term not exceeding fifteen years. Sec. 154 of the Criminal Code, under which respondent was convicted for possessing canceled postage, provides a fine of not more than $5000 and imprisonment for a term not exceeding ten years. On the other hand, Sec. 219 of the Criminal Code, Title 18, Sec. 348, provides that whoever forges or counterfeits postage stamps or other postal matter shall be fined not more than $500 and imprisoned for not more than five years.

It challenges reason to presume that Congress intended to punish one tampering with a canceled stamp to cheat a philatelist, in excess of punishment meted out to a counterfeiter of its unused postage.

Strict interpretation, which is required for all criminal statutes, forbids a result so incongruous.

U. S. v. *Noveck*, 271 U. S. 201.

III.

There was a fatal variance between the indictment and the proof.

Count one of the indictment failed to charge the sale of genuine canceled postage stamps, which had been altered. Count two failed to charge possession of genuine canceled or uncanceled postage stamps, which had been altered.

It is essential that an indictment charge the elements of the crime in such manner that the judge before whom defendant is brought for pleading and trial may, by reading the indictment, determine whether, under the law, the facts stated are sufficient to support a conviction.

U. S. v. *Cruikshank*, 92 U. S. 542;
U. S. v. *Carll*, 105 U. S. 611;
Miller v. *U. S.*, 133 Fed. 337 (C. C. A. 8th Cir.);
De Lemos v. *U. S.*, 91 Fed. 497 (C. C. A. 5th Cir.).

Count one of the indictment (R. 2) alleges that the defendant sold "certain false and altered obligations of the United States" with the intent that they be passed as true and genuine, that is to say (stamps enumerated) "all of which said forged and altered stamps were in the like-

ness and similitude of genuine United States postage stamps, issued in pursuance of law, and of the following tenor (picture of stamps)."

Count two (R. 3) alleges that the defendant with intent to defraud kept in his possession and concealed approximately 573 false and altered obligations of the United States, "all of which said forged and altered stamps so possessed being in the likeness and similitude of genuine United States postage stamps, issued in pursuance of law and being of the following tenor (picture of stamps)."

Both counts studiously avoid setting forth the acts, with which the defendant was in fact charged—sale of four genuine canceled United States postage stamps, which had, with defendant's knowledge been altered, after cancellation, by addition of overprints and (second count) possession with intent to sell of 573 genuine canceled and uncanceled United States postage stamps, which had been altered by addition of overprints or addition or removed of a grille or perforations. Nowhere is it stated that the stamps were genuine in their origin or that any of them were canceled and so remained. The indictment compels one to infer that the defendant is charged with selling and possessing stamps wholly counterfeit, to be used as stamps.

A defendant under such an indictment is denied his right to properly plead, for he cannot plead *nolo contendere* and allow the court to determine whether the facts are sufficient to constitute a crime.

A fair indictment under the first count would have charged the defendant with selling altered genuine cancelled postage stamps, to which had been added names, "Kans" or "Nebr" so as to defraud philatelists. A fair indictment under the second count would have charged the defendant with possessing for sale, altered genuine cancelled stamps, to which overprints had been added and an

altered genuine uncancelled stamp, to the border of which a false perforation had been added. This would have enabled the defendant to move against the indictment and challenge its sufficiency.

Compare the indictment in this case with that in *Errington* v. *Hudspeth*, 110 Fed. (2nd) 384 (C. C. A. 10) wherein the court said (385):

> "Count one charged that the petitioner, on March 15, 1938, wilfully, unlawfully, knowingly, feloniously and with intent to defraud, falsely altered a genuine obligation of the United States, to wit, a U. S. sixteen cent special delivery air mail postage stamp by tinting and coloring it green with the intent and purpose to thereby create a fictitious value in said stamp over and above its true value.
>
> "The remaining 44 counts are identical with count one except that they relate to different stamps."

So too in *Foster* v. *U. S.*, 76 Fed. (2nd) 183, a case involving a change made in a genuine five dollar bill, the indictment specifically charged the changing of a "genuine United States note." The Court said (184):

> "Appellants were indicted in four counts. The first charged that they 'unlawfully, wilfully, knowingly, feloniously and with intent to defraud, each did falsely alter a certain obligation of the United States, to wit, a United States note in the denomination of Five and no/100 ($5.00) Dollars Series of 1929 Serial Number * * * and which said genuine obligation of the United States was altered in this, in that the said serial number was changed to read * * *"

Had the indictment, in the case before the Court, followed the forms of the indictments in the *Errington* and *Foster* cases, in the five years that intervened between the indictments and the trial, its sufficiency could have been challenged by motion. On such motion the defendant could have raised the issue that the acts charged against him do not constitute a federal crime.

The variance is substantial and prejudicial to the point where it has deprived the defendant of his constitutional rights—his right to stand before a court informed by the indictment, in advance of the trial—and not by the district attorney after the trial has started—of the acts of which he was accused. His right to plead before a court informed by an indictment of the nature of the charge. His right to stand mute and have the Court determine whether the acts charged constitute a crime.

In *United States* v. *Hess*, 124 U. S. 483, 488-489, the Court said:

> "The essential requirements, indeed, all the particulars constituting the offense of devising a scheme to defraud, are wanting. Such particulars are matters of substance, and not of form, and their omission is not aided or cured by the verdict."

And in *Miller* v. *U. S.*, 133 Fed. 337 (U. S. C. C. A. 8th Cir.) the Court said (p. 341, italics supplied):

> "It (the indictment) must set forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet, so fully as to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime, *and so clearly that the court, upon an examination of the indictment, may be able to determine whether or not, under the law, the facts there stated are sufficient to support a conviction.* United States v. Hess, 124 U. S. 483, 486, 487, 8 Sup. Ct. 571, 31 L. Ed. 516; United States v. Post (D. C.), 113 Fed. 852."

In Joyce "Law Governing Indictments" 2nd ed., Sec. 285, the author says:

> "An indictment charging a violation of a statute must so state the facts that upon demurrer, the facts being admitted, an intelligent judgment can be pronounced by the court, and the sufficiency of an indictment depends on whether the facts there alleged can be true and the defendant yet be innocent of the offense intended to be charged."

The Court of Appeals thought that this objection "reflects an attitude now long past." The majority opinion cites the first ten forms incorporated in Rule 58 as "examples of the general terms now permitted." An examination of the forms serves to emphasize the point here urged. These forms though simple are specific. Form 1, for example, alleges that the defendant, "with premeditation and by means of shooting murdered John Roe, who was then an officer of the Federal Bureau of Investigation of the Department of Justice, engaged in the performance of his official duties." It would not be sufficient to allege that defendant "murdered" John Roe or "caused the death of John Roe, by means of shooting." The indictments would then be sufficiently broad to admit of facts, which might not amount to murder at all. For example that the defendant failed to warn John Roe that some one was lying in ambush awaiting him.

Therein lies the deficiency in the indictment in this case. The section of the Criminal Code, upon which the indictment is based are the "counterfeiting" sections and cover a multitude of activities. In this case it is claimed that the sections are broad enough to cover one who alters a canceled stamp, though he does not obliterate the cancellation mark. In the *Pappas* case (134 F. 2nd 922) it was held that the sections applied to one who cut away uncanceled portions of different canceled stamps and pasted them together, to form what appeared to be an unused stamp. In *Errington* v. *Hudspeth,* 110 F. 2nd 384, it was

held that the sections applied to tinting an unused stamp, a different color, to defraud a philatelist. Yet the form of indictment in this case, if good, could apply to any one of these and many more.

It may be, as the Government argued below, that a defendant in that situation may obtain a bill of particulars. But bills of particulars are discretionary with the Court and must be timely demanded. Rule 7 (f) of Federal Rules of Cr. Pro. Defendants are not always represented by counsel learned in federal practice. Then too a bill of particulars is drawn by a district attorney while an indictment is the charge of a grand jury. Only by an inspection of grand jury minutes, seldom if ever allowed in federal practice, would one be able to discover, if at all, whether the bill of particulars coincided with the intent of the indictment.

It is, therefore, urged that the indictment in this case, which failed to specify the elements of the alleged crime, with sufficient particularity to enable the Court to determine whether a crime had in fact been committed, was insufficient.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[APPENDIX FOLLOWS]

APPENDIX TO BRIEF

AN ACT

To permit the printing of black-and-white illustrations of United States and foreign postage stamps for philatelic purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Postmaster General shall prepare in such form and at such times as he shall deem advisable, and, upon his request, the Public Printer shall print as a public document to be sold by the Superintendent of Documents, illustrations in black and white of postage stamps of the United States, together with such descriptive, historical, and philatelic information with regard to such stamps as the Postmaster General may deem suitable; *Provided,* That notwithstanding the provisions of section 52 of the Act of January 12, 1895 (U. S. C., 1934 edition, title 44, sec. 58), stereotype or electrotype plates, or duplicates thereof, used in the publications authorized to be printed by this section shall not be sold or otherwise disposed of but shall remain the property of the United States: *And provided further,* That notwithstanding the provisions of section 7 of the Copyright Act of March 4, 1909 (U. S. C., 1934 edition, title 17, sec. 7), or any other provision of law, copyright may be secured by the Postmaster General on behalf of the United States in the whole or any part of the publication authorized by this section.

SEC. 2. The Act of March 3, 1923 (U. S. C., 1934 edition, title 18, sec. 350), is amended to read as follows: "That (a) nothing in sections 161, 172, and 220 of the Criminal Code, as amended, or in any other provision of law, shall be construed to forbid or prevent the printing, publish-

ing, or importation, or the making or importation of the necessary plates for such printing or publishing, for philatelic purposes in articles, books, journals, newspapers, or albums (including the circulars or advertising literature of legitimate dealers in stamps or publishers of or dealers in philatelic or historical articles, books, journals, or albums), of black and white illustrations of—

"(1) foreign revenue stamps if from plates so defaced as to indicate that the illustrations are not adapted or intended for use as stamps;

"(2) foreign postage stamps; or

"(3) such portion of the border of a stamp of the United States as may be necessary to show minor distinctive features of the stamp so illustrated, but all such illustrations shall be at least four times as large as the portion of the original United States stamp so illustrated.

"(b) Notwithstanding any other provisions of law, the Secretary of the Treasury, subject to the approval of the President, may, upon finding that no hindrance to the suppression of counterfeiting and no tendency to bring into disrepute any obligation or other security of the United States will result, by regulations, permit, to the extent and under such conditions as he may deem appropriate, the printing, publishing or importation or the making or importation of the necessary plates for such printing or publishing, for philatelic purposes in articles, books, journals, newspapers, or albums (including the circulars or advertising literature of legitimate dealers in stamps or publishers of or dealers in philatelic or historical articles, books, journals, or albums), of black and white illustrations of canceled or uncanceled United States postage stamps. The Secretary, subject to the approval of the President, may amend or repeal such regulations at any

time. Such regulations, and any amendment or repeal thereof, shall become effective upon publication thereof in the Federal Register or upon such date as may be specified therein if later than the date of publication. All findings of fact made hereunder shall be final and conclusive and shall not be subject to review."

SEC. 3. Section 147 of the Criminal Code is hereby amended by striking out the period at the end thereof and adding a comma and the following: "and canceled United States stamps."

SEC. 4. Section 172 of the Criminal Code is hereby amended by the addition of the following new paragraph at the end thereof:

"Except as to counterfeits, material, and apparatus referred to in the preceding paragraph, all articles and devices and any other thing whatsoever made, possessed, or an any manner used in violation of any of the provisions of chapter 7 or sections 205, 218, 219, or 220 of chapter 8 of the Criminal Code, or the Act of August 26, 1935 (U. S. C., 1934 edition, title 18, ch. 7, and secs. 328, 347, 348, 349, and 349a, ch. 8), as amended, or in respect to which a violation of any such provision has occurred, and all material or apparatus fitted or intended to be used, or that shall have been used, in the making of such articles, devices, or other things, that shall be found in the possession of any person without authority from the Secretary of the Treasury or other proper officer to have the same, shall be taken possession of by any authorized agent of the Treasury Department and forfeited to the United States and disposed of in any manner the Secretary of the Treasury may direct. Whoever having the custody or control of any such articles, devices, or other things, material or apparatus shall fail or refuse to surrender possession thereof upon request by any such authorized

agent of the Treasury Department shall be fined not more than $100 or imprisoned not more than one year, or both. Whenever any person interested in any article, device, or other thing, or material or apparatus seized under this paragraph files with the Secretary of the Treasury, before the disposition thereof, a petition for the remission or mitigation of such forfeiture, the Secretary of the Treasury, if he finds that such forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or the mitigation of such forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just."

Approved, January 27, 1938.